No. 7325.

United States
Circuit Court of Appeals
For the Ninth Circuit.

Baash-Ross Tool Company, State Oil-fields Supply Company, Standard Pipe and Supply Co., A. D. Mitchell, Frances Hargrove and Juanita Cook,
Appellants,

vs.

Ralph L. Stephens,
Appellee.

PETITION FOR REHEARING.

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Come now the appellants above named and petition the above court to grant a rehearing from its decision as filed on November 26, 1934, affirming the order of the United States District Court granting a discharge to the appellee and bankrupt, and as grounds for rehearing specify the following:

I.

That said decision is directly contrary to the uncontradicted evidence.

II.

That the statement contained on pages 3 and 4 of the opinion, to-wit, "without taking up these different statements and reports in too much detail it might well be observed that Exhibit 2 purported to show the financial condition of the bankrupt on September 1, 1930, and that Exhibit 4 was a statement of his affairs at a time not less than five months thereafter, and an inspection of the two statements reveals several differences, some decreases, some increases, in the corresponding items thereof. These differences would seem to clearly indicate that in the bankrupt's affairs much transpired during the interim between the two statements, and that by reason thereof a comparison of the statements is of little assistance in ascertaining the truth or falsity of the items set forth in Exhibit 2," is directly contrary to the uncontradicted evidence in the record.

Statement of Facts in Support of Above Grounds.

At the time of the oral argument before the above court it was admitted that the evidence disclosed at page 62 of the transcript was uncontradicted that the statement that the assets and liabilities designated as Exhibit 4 in evidence and as Exhibit A for identification before it was received in evidence, showed the same condition of assets and liabilities as set forth on Objectors Exhibit 2. At that time appellants in their argument were stopped by the court, when the court's attention was directed to the fact that the encumbrances as shown on Exhibit 4 totaled $114,568.37 instead of $70,897.00, or a difference of $43,671.37. The court stated that it desired to hear from

the appellee to explain such difference. When appellee was unable to explain such difference the court permitted appellee twenty minutes time while it listened to another case to satisfactorily account for such difference, at the end of which time appellee failed to satisfactorily convince the court and thereupon the court gave appellee and appellant time in which to prepare a supplemental brief. In such supplemental brief appellee again failed to account for such differences of $43,671.37 in the encumbrances, whereas, on the other hand, appellant distinctly showed in his supplemental brief as well as in the original briefs that all of the property set forth on Objecting Creditors Exhibit No. 4 had been acquired prior to September 1, 1930, the date of the financial statement designated as Objecting Creditors Exhibit No. 2.

In addition, if the court will refer to page 30 of the transcript the court will find the following:

> TESTIMONY OF RAPHAEL DECHTER.
>
> The document, Exhibit "A" for Identification, was produced from my records, having been given to me by the bankrupt when I examined him in Mr. Moss' Court in the private room of the court reporter, Mr. Olson. The notations in ink on said document are in my handwriting. [Rep. Tr. p. 14.]
>
> Whereupon said document was admitted as Objecting Creditors Exhibit 4.
>
> TESTIMONY OF RALPH L. STEPHENS.
>
> Bankrupt resumed. [Rep. Tr. p. 14.]
>
> The item of $250,400.00 on Exhibit 4, covering real estate, stocks, bonds, etc., corresponds to the same item shown on statement to the Baash-Ross

Tool Company under the item of real estate, stocks and bonds in the amount of $266,859.00.

A. Yes, but you received this notation here as to business conditions when they were different, and depreciation on stocks or on a deal of real estate, foreclosure or something might have made that difference in there. [Rep. Tr. p. 14, line 18.]

The item of $70,897.00 represents encumbrances on item 8, which includes the real estate shown in said statement to the Baash-Ross Tool Company. The item: "Encumbrances on land, $114,568.37" represented encumbrances on real estate shown on Objecting Creditors Exhibit 4. The real estate shown on Exhibit 4 included property in the names of other persons. The item on page 3 of the statement to the Baash-Ross Tool Company, being Objecting Creditors Exhibit 2, "Long Beach Boulevard frontage" corresponds to lots 187 and 188, etc., on Exhibit 4, and is set up as of the value of $85,000.00, with encumbrances of $29,900.00 and was included in statement, Objecting Creditors Exhibit 2.

Also on page 62 of the transcript the appellee and the bankrupt testified that at the time he started in dealing with Baash-Ross Tool Company and when he went into the oil business in Venice all of these encumbrances had been placed on all of these different properties (referring to Exhibit 4). In other words, the above uncontradicted evidence shows that the statement of the court to the effect that "much may have transpired between the time of the giving of the financial statement, Exhibit 2, as of September 1, 1930, and the making of the statement, Exhibit 4," does not find any support anywhere in the record, but is as aforesaid, directly contrary to the evi-

dence in the record that all of the encumbrances on the bankrupt's property had already been placed thereon when he started dealing with Baash-Ross Tool Company and when he had gone into the oil business in Venice, and as shown by the supplemental brief, reference to which is hereby made, all of the properties mentioned on Exhibit 4 had been acquired prior to the date of the giving of this financial statement, Exhibit No. 2.

On page 6 of appellant's supplemental brief, it is pointed out that the encumbrances on Lot 1, Tract 1290 designated as the Downey property and Lots 187 and 188, etc., Tract 3233 designated as the Long Beach Boulevard property [See also Tr. p. 90] were $41,940 and $29,900, respectively, or $71,840 without taking into consideration the other nine parcels of real estate. On page 60 of the transcript the bankrupt testifies that he bought Lot 1, Tract 1290 in 1926, and on page 61 of the transcript that he bought Lots 187 and 188, Tract 3233 in 1929, also stating that the properties were encumbered as above. On page 62 of the transcript the bankrupt testified as to the other properties, to wit: Lots 16 to 22, Tract 3209, encumbered for $3,000 and Lot 47, Tract 3722, San Vincente encumbered for $1347.76, both of which properties he states were encumbered and purchased in like manner prior to 1929 and then adds that all these encumbrances on all these properties, referring to all of the properties on Exhibit 4 were encumbered at the time he started in dealing with the Baash-Ross Tool Company and when he went into the oil business in Venice, which would be prior to September, 1930; yet on the financial statement given by him to the Baash-Ross Tool Company and to the State Oilfields Supply Company, Exhibits 2 and 3, he shows

only encumbrances of $70,897.00 when the encumbrances on only the four parcels above mentioned total $76,187.76, without considering the other five parcels also heavily encumbered. In addition to the general statement contained on page 62 that all of his properties were subject to the encumbrances shown on Exhibit 4 prior to September of 1930, we find specific mention by the bankrupt in the record of other properties so encumbered in addition to the four parcels above mentioned. On page 32 of the transcript the bankrupt testifies that the Inglewood lot on the financial statement, Exhibit 2, corresponds to Lots 132 and 133, Tract 6794, shown on Exhibit 4; that they were acquired in March of 1930 and were encumbered at said time in the amount of $2500.00; at page 85, being financial statement, Exhibit 2, the bankrupt states that all of his property is encumbered. On page 33 the bankrupt testifies that the properties designated as Orange Grove on Exhibit 2 is the same as the Azusa property designated as the SE¼ of the NW¼ of SW¼ of Section 2, Township 1, South Range 10, West Azusa, which property is encumbered to the extent of $6,000. On page 22 of the transcript the bankrupt also testifies that the Southgate lots, as well as Lot 47, Tract 3722, being the one-half acre mentioned in Exhibit 2 were included in Exhibit 4. Unfortunately the exact description of the Southgate lots was not secured at the time. However, on page 51 the bankrupt, on cross-examination, by his own counsel, testifies that Lot 12 of the Claremont Tract mentioned on Exhibit 4, as well as other properties were included in the financial statement Exhibit 2, which latter property was encumbered to the amount of $7,000. These additional specific instances so testified to by the bankrupt show further encumbrances of $15,500 or a total of $91,687.76, all

specifically mentioned by the bankrupt as encumbrances and as included in the financial statement, Exhibit 2, outside of the general statement that all of his properties were encumbered as shown on Exhibit 4, when the statements, Exhibits 2 and 3, were given.

The unexplained discrepancy in the encumbrance of $43,671.37 constituted the principal ground set forth by appellants for a reversal and we still contend that it is the principal ground. We have heretofore defied appellee to explain or account for the failure to set forth the difference in said encumbrances on the statements which induced the appellants to give the bankrupt credit. To date the appellee has failed to account for such difference in the encumbrances and unless the court is going to indulge in a surmise as is contained in the opinion that something might have happened in the interim when the evidence shows that nothing did happen in the interim, we feel that justice requires that a rehearing be granted and that the order of the District Court be reversed.

While it is true that a person may in good faith overestimate the value of his property, yet he cannot under such decisions as *Firestone v. Harvey,* 174 Fed. 574, make a statement recklessly without an honest belief in its truth and that a grossly exaggerated valuation will be suggestive of fraud. While we do not primarily base our grounds of reversal upon these over-valuations, when the same is taken into consideration with the unexplained difference in the encumbrances as actually existed and as set forth on the statements, Exhibits 2 and 3, we cannot help but feel that the valuations were so grossly over-estimated as to be in the language of *Firestone v. Harvey, supra,* suggestive of fraud. For instance, the Long Beach Boule-

vard property, which was valued at $85,000.00 in the financial statements was purchased by the bankrupt for $46,000.00 in 1929 and 1930. This court can take judicial notice of the fact that since 1929, and long before said time, real estate values had been gradually decreasing in value and that there has not been a rise in values since 1929. Yet, in making his statement to the appellants, he values said property at $85,000.00, almost an increase of one hundred per cent. What is the explanation of this remarkable increase? We submit there is none which would justify the $85,000.00 value.

We feel that the foregoing coupled with the other attendant circumstances show that the bankrupt was wilfully fraudulent. For example on page 37 of the transcript we find a mention of three different attachments suits for substantial amounts, in addition to the Feinstein suit of $17,000 already filed at the time of the giving of the financial statements, Exhibits 2 and 3, and of which no mention is made in said financial statements by the bankrupt [Tr. p. 28]; also the fact that the bankrupt on the eve of the attachment by the Baash-Ross Tool Company made a transfer to his secretary's brother of his automobile for $1500, supposed to be evidenced in cash, and that although he had three bank accounts, he testified that he did not deposit said money in any bank, as well as the fact that he continued to drive said car after said transfer in like manner as before [Tr. p. 42]; also the fact that in his income tax return for the year 1930 no mention is made of the sale of said automobile, although losses on other transfers are specifically mentioned, but on the contrary the bankrupt takes deduction for the depreciation on the car as if he still owned it [Tr. pp. 92 and 98]; also

on page 63 the bankrupt testifies that he owned $13,000 worth of street bonds which he pledged to the Petroleum Equipment Company, but of which he made no mention in his statement, although he owned such bonds before October, 1930; also the fact that in addition to having all of his real property in other people's names, he also had his country club membership in a dummy's name [Tr. p. 64]; also the fact that the bankrupt turned over no books or records of any kind to the trustee [Tr. p. 66].

The court must remember that since the amendment of 1926 that the requirement of the intent for the purpose of obtaining credit was eliminated and that under the act as it now reads the obtaining of money or property on credit or obtaining an extension or renewal of credit by making a materially false statement regarding his financial condition is all that is required. In this connection we feel that the language of the court in its opinion on page 6 that the fact that the bankrupt in his financial statement did not set forth the fact that all of his stocks were pledged was only improper, we contend that this was a material omission making his statement false. We also wish to state that there is evidence in the record showing what the stocks and bonds were pledged for. On page 41 of the record appears the fact that the Emsco stock, and the City National Bank stock had been pledged to the Union Indemnity Company. On page 30 appears the fact that the notations in ink on Exhibit 4 were made by counsel for the appellants at the time he was examining the bankrupt. The court will observe on pages 90 and 91 the notation opposite the Emsco Derrick & Equipment Company stock that it was put up as security in Feinstein suit for $17,500.00. In other words, such stocks were put

up with the Union Indemnity Company as collateral for the execution of a release of attachment bond and all of said stocks were sold and retained by the Union Indemnity Company after the judgment had become final by Mr. Feinstein, leaving the Union Indemnity Company with an unsecured claim against the bankrupt. Yet, as shown on page 40 of the transcript, there was nothing anywhere on the financial statement, Exhibits 2 and 3, to show that any of said stocks had been pledged.

The court also loses sight of the fact that the bankrupt specifically stated that he did not list in any of his financial statements his personal obligations. [Tr. p. 28.] The court also apparently overlooks the uncontradicted evidence in the record that whereas the bankrupt listed furniture and equipment of the value of $5269.15 on Exhibit 2 that he stated on page 43 of the record that he never had that much furniture.

The court in its opinion justifies the omission of any mention of the suit by Feinstein for $17,500.00 by reason of the fact that the bankrupt did not also include an alleged judgment of $256,000.00 against Feinstein. If this reasoning is to be pursued to its logical conclusion, it will be a constant justification by bankrupts that while they omitted certain items material in their financial statement, they were more than over-balanced by items that they did not include. The purpose of a financial statement is to enable the credit man to investigate each of the items and if the bankrupt had included both items in his statement, the credit manager would have ascertained that the suit for $17,500.00 was for money advanced for and on behalf of the bankrupt, whereas the judgment for

$256,000.00 was a default taken on one cause of action after demurrer had been sustained to two causes of action in an action trying to recover damages for alleged violation of the bucket-shop laws of California and which action, when it came to trial after the judgment had been set aside, bankrupt's own counsel admitted had no merit and was merely an attempt to offset the claim of Feinstein by a frivolous action.

We respectfully contend that merely the failure to account for the difference of $43,000.00 in the encumbrances, in other words the under-statement of his encumbrances in the amount of $43,000.00, is sufficient in itself to warrant a rehearing and a reversal of the order of the court, and we respectfully so petition.

Respectfully submitted,

RAPHAEL DECHTER,
Attorney for Appellants.

Certificate of Good Faith

The undersigned does hereby certify that the above petition for rehearing is well founded, is made in good faith and not for the purpose of delay, and in the opinion of counsel said petition is meritorious.

R. DECHTER.